No. 12389

In the United States Court of Appeals for the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLANT

v.

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLEES

AND

MAY PAULA MOUAT AND M. W. MOUAT, WIFE AND HUSBAND, AND MAY PAULA MOUAT, AS TRUSTEE OF AN EXPRESS TRUST, APPELLANTS

v.

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION, APPELLEE

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QUESTION PRESENTED

Whether dwellings erected upon the leased premises by lessee became the property of lessors by virtue of a provision in the lease that upon its termination "wooden buildings" should be among the things left intact.

STATEMENT

This is a cross-appeal (R. 418-419) from the judgment below (R. 391-397). Thereby, the former lessors complain (1) of the refusal of the trial court to award them the value of 22 dwellings and of dwelling fixtures removed from the leased premises between March 1, 1946, when the lease terminated, and September 1, 1946, and (2) of the provision in the judgment (R. 396) that the Reconstruction Finance Corporation "is the owner, and entitled to the possession of all houses, buildings or structures * * * upon the Lake Placer Mining Claims, and without requirement of immediate removal."

The determinative facts are as follows:

Paragraph 22 of the lease provided (R. 30):

> Promptly upon receipt of Lessee's written request, Lessors will execute and deliver to Lessee a quitclaim deed of all of Lessor's right, title and interest in and to property not to exceed 200 acres, to be designated by Lessee for use by Lessee for millsites, townsites, stock pilings and tailings disposal.

Such a deed was never requested (Fdg. XVI, R. 387-388).

However, Metals Reserve Company, the original lessee, erected upon a part of the leased premises, known as the Lake Placer Claims, 103 wooden buildings (with concrete foundations) designed to house the workers at the mine and mill and give them the stores, schools and medical facilities needed to make those dwellings habitable.[1] As of September 1, 1946, only one had been removed. By that date, the plumbing in all the structures had been removed. After that date,

[1] Hereafter, all of these buildings will be referred to as "dwellings."

21 additional dwellings were removed. The other 81 still remain.

The former lessors (cross-appellants) based their claim on paragraph 15 of the lease. So far as material, that paragraph (R. 28-29) declared:

> Upon * * * the termination of this Lease * * * Lessee shall have six (6) months' additional time to remove from the leased premises its personal property and its tools, equipment, machinery, tracks and tramways, but shall leave intact all mine workings and timberings, ties and all excavations, foundations, wooden mine structures, wooden tramway towers and *wooden buildings*[2] erected upon the demised premises and ore on dumps upon which royalties have not been paid.

Because the dwellings were *wooden buildings,* the former lessors found in paragraph 15 an undertaking on the part of lessee to deliver them over.

John Edward Norton, an engineer, and Arthur S. Hutchinson, a lawyer, testified to the purpose and meaning of paragraph 15. They represented the lessee, and William Mouat and his lawyers represented the lessors, in the negotiations which were concluded by the drafting and execution of the lease (R. 226). Norton and Hutchinson both testified that discussions between the negotiators made plain that paragraph 15 dealt with mine sites, "sites where you went in the ore body and opened up to develop the ore body" (R. 223; see also R. 227, 295). The "wooden buildings" mentioned in that paragraph meant the buildings which would house hoisting engines, machine shops, and the like (R. 229).

The need for lands upon which mills and dwellings could be put was also discussed in the negotiations. The lessee wanted title to the lands used for these pur-

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[2] Italics supplied.

poses (R. 222, 223). As Hutchinson said (R. 306-307): "We told Mr. Mouat that this was going to be a very large undertaking and a great deal of money was going to be spent and we had to have so-called fee land, that is, land owned by the Government on which these expensive improvements would be placed." (See also R. 230). It was ultimately decided that 200 acres would suffice for this purpose (R. 222-223, 297).

The admission of this testimony was objected to—unsuccessfully—on the ground that paragraph 15 was so plain that it needed no explanation (R. 219-220, 295-296, 305).

Upon this point, the opinion of the trial court stated (R. 365-366):

> It does not seem reasonable to assume in the absence of clear and unmistakable language to that effect that officers and Boards of the Government would undertake the expenditure of such large sums for homes of their employees on grounds used as a townsite, with the intention of making a present of such property to lessors upon the termination of the lease, and the language is by no means clear that such was their intention. The very fact that the contract provided for the conveyance of land by lessors for townsite and other purposes would seem to disclose the intent that any buildings erected thereon would become the property of lessees. * * * This question is important, and the higher court may find a different solution, but in this court's view it was not the intention that the language to be construed would apply to the homes, or residences, on the Lake Placer Claim, and that they were not intended to become the property of the plaintiffs upon the termination of the lease.

Accordingly, the trial court found (Fdg. XVI, R. 387-388):

> But it was the intention of the parties that land would be furnished by the lessors for the construction of townsites and * * * that the "buildings" to be left on the premises after termination would include only ordinary wooden buildings, such as tool houses, machine houses, etc., and other structures necessarily constructed in connection with mining operations. It was not the parties' intention that buildings constructed as part of a townsite should be left on the premises upon termination of the lease.

ARGUMENT

The Lease Did Not Confer Upon the Lessors the Title to the Dwellings

The contention of the cross-appeal is that the dwellings were given to lessors by the provision in paragraph 15 of the lease whereby the lessee agreed to leave intact "wooden buildings." They argue (Br. 26-38) that the quoted term unequivocally includes every structure made of wood and that the trial court erred in permitting testimony showing it had a more limited meaning and in holding it did not embrace the dwellings in question.

Preliminarily, it may be conceded that since the dwellings had wooden walls and roofs they could be described as "wooden buildings." Moreover, in the enumeration of things that the lessee could remove, there is no word or term which would include them. To this extent paragraph 15 seems to support lessors' claim.

However, such an impression disappears upon further examination of paragraph 15 and of the cognate provisions of paragraph 22. Thus, the things (other than "wooden buildings") specified in the earlier paragraph—tools, equipment, machinery, tracks and tram-

ways (to be removed) and mine workings, and timbering ties and all excavations, foundations, wooden mine structures, wooden tramway towers and ore on dumps (to be left intact)—unmistakably pertain to the mines. By familiar rules, the remaining term, "wooden buildings," is to be construed in that context and hence is also limited to buildings constructed for the working of the mines. *Smith* v. *McCullough,* 104 U.S. 25, 28-29 (1881); *Cleveland Trust Co.* v. *Consolidated Gas, E. L. & P. Co.,* 55 F.2d 211, 215 (C.C.A. 4, 1932); *O'Connor* v. *Great Lakes Pipe Line Co.,* 63 F. 2d 523, 526-527 (C.C.A. 8, 1933).

This limited meaning is confirmed by paragraph 22, requiring lessors, at the request of Metals Reserve, to quitclaim "all of Lessor's right, title and interest in and to property not to exceed 200 acres, to be designated by Lessee for use by Lessee for millsites, townsites, stock pilings and tailings disposal." Obviously, the buildings which would have been placed upon these townsites would have remained the property of the lessee. It goes without saying that these buildings would have been the dwellings here in question. And, since they would have remained the property of the lessee after the termination of the lease, there would have been no need for providing for their disposition after that event. Thus, the "wooden buildings" of paragraph 15 would not comprehend them. Clearly, then, the term was not used to designate these dwellings.

It is therefore apparent, contrary to lessors' argument, that paragraph 15 is susceptible of construction and that, rightly construed, it has no application to the dwellings in question. This being so, there is no basis for lessors' complaint that the trial court permitted testimony to this effect. That testimony merely reaffirmed the meaning which *on the face of the lease*

must be assigned to the words "wooden buildings" as used in paragraph 15. As the trial court held (Fdg. XVI, R. 387-388), these words meant "the tool houses, machine houses, etc., and other structures necessarily constructed in connection with mining operations." [3]

Of course, the fact that Metals Reserve erected the dwellings on the Lake Placer Claims without obtaining a quitclaim deed does not enlarge the meaning and effect of paragraph 15. Nor is there anything which would suggest that by failing to get this deed Metals Reserve manifested an intention to give lessors other structures in addition to those specified in that paragraph.

Thus, notwithstanding lessors' contrary contention (Br. 28) it is clear that the Lake Placer Claim (which comprised less than 200 acres) could have been requested by lessee as a townsite under paragraph 22. The language is unqualified: "all of Lessors' right, title and interest in and to property not to exceed 200 acres." Any land, therefore, which lessors could transfer whether or not covered by the lease could be demanded by the lessee provided it was to be used for any of the purposes named—millsites, townsites, stock pilings and tailings disposal. And since the land could be used for these purposes only, there is no basis for lessors' contention (Br. 28) that unless leased lands are excluded from the purview of the paragraph, under its guise lessee was empowered to demand the *minesites* and then to extract the ores without paying the stipu-

[3] At Br. 27, lessors refer to—but do not there or elsewhere base any argument upon—paragraph 20 of the lease (R. 30) providing that anything remaining on the premises "more than six months after * * * termination shall conclusively be deemed to have been abandoned by the Lessee in favor of the Lessors." This paragraph merely emphasizes paragraph 15 and, since paragraph 15 does not apply to the dwellings in question, has no bearing here.

lated royalties. (Furthermore it should not be forgotten that this lease was procured with the object of producing vital war material and not to defraud lessors out of the royalties which lessee bound itself to pay.)[4]

Since paragraph 22 did not require that lessee demand a quitclaim deed before beginning construction—or, indeed, at any particular time thereafter—lessee's use of the Lake Placer Claims as a site for the dwellings without such a demand was consistent with its intent to retain title to the dwellings. The fact that the demand was never made cannot be converted into a change of lessee's intent. On the contrary, the removal of some of the dwellings and retention of the others make plain that the intent to retain title to these structures has persisted. The fact that a quitclaim deed of the site

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[4] At Br. 28, lessors lift out of context a portion of one of Mr. Norton's answers during their cross-examination of him and seize upon it to support their construction of paragraph 22. They say: "But Norton for R.F.C. says: 'It was our idea that this 200 acres was deeded, and that that would not be on any land covered by the lease.' " The record at this point (R. 230) is as follows:

Q. I see. And yet in spite of all of that knowledge at that time the lease came out in its present form?

A. Yes, it was our idea that this 200 acres of land was deeded and that that would not be on any land covered by the lease, and that this paragraph here that Mr. Mouat would get all the buildings, wooden buildings and structures erected around the mine entrances.

Q. Now just what exactly did you tell Mrs. May Paula Mouat?

A. Oh, Mrs. May Paula Mouat I don't remember that we told her very much.

Mr. Maury: That is all.

From the foregoing it is obvious that the questions and answers were not directed to the construction of paragraph 22, that the answers do not even incidentally shed light on the meaning of that paragraph, and that—as is shown by his swift change and termination of the cross-examination—lessors' council did not then ascribe to Mr. Norton's stray remark the weight he would have this Court give it now.

has not been requested merely discloses that the Government is content to have the dwellings and to let the ownership of the land on which they stand be determined without regard to the lease. Since the lessors have not been misled or otherwise disadvantaged by this policy, it affords no support for their claim.

CONCLUSION

For the foregoing reasons it is submitted that the parts of the judgment attacked by the cross-appeal should be affirmed.

Respectfully,

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